IV

Jurisdictional Statement

The following statement particularly discloses the basis upon which it is contended that this Court has jurisdiction upon certiorari to review the decree in question:

(a) The statutory provision believed to sustain the jurisdiction is § 237 (b) of the Federal Judicial Code [28 USCA, § 344 (b),—28 FCA, § 344 (b)], as follows:

> "It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by appeal, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had where is drawn in question the validity . . . . of a statute of any State on the ground of its being repugnant to the Constitution . . . . . of the United States; or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution . . . . of the United States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied . . ." [quoting only so much of the paragraph as is pertinent to the issue].

We also rely on the following portion of Court Rule 38, paragraph 5, which provides in part:

> "A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion,

indicate the character of reasons which will be considered:

(a) Where a State court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court".

(b) The statute of the State of Michigan, the validity of which is involved [and which the court interpreted and construed, as well] is the 'Use Tax Act' of that State, Act 94, Public Acts of Michigan, 1937 [Appendix 'A' (2)].

(c) The date of the decree sought to be reviewed was the 13th day of August, 1941, and the approximate date upon which this petition for certiorari is presented is the 17th day of September, 1941.

(d) The following cases are believed to sustain the jurisdiction,

Southern R. Co. v. Clift, 260 U.S. 316, 319,
Sterling v. Constantin, 287 U.S. 378,
Indiana ex rel. Anderson v. Brand, 303 U.S. 95, 98,

and it is our contention that the State court decided a federal question of substance in a way probably not in accord with the following applicable decisions of this Court:

Henneford v. Silas Mason Co., 300 U.S. 577,
Felt & Tarrant Co. v. Gallagher, 306 U.S. 62,
Southern Pacific Co. v. Gallagher, 306 U.S. 167,
McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33,
McGoldrick v. Felt & Tarrant Co., 309 U.S. 70.

(e) The grounds upon which it is contended the questions involved are substantial, are as follows:

[1] If, as we surmise, the State court, while construing the Michigan 'Use Tax Act', held, in effect, that the nature of plaintiff's business was wholly interstate, and that, because of the commerce clause, the State of Michigan could not compel J. B. Simpson, Inc., to collect the tax from its Michigan customers, then the question presented involves a substantial amount of State revenue.

[2] If, as we think, the State court's decision on a federal question was not in accord with applicable decisions of this Court rendered subsequent to the opinion of the Michigan Supreme Court in *J. B. Simpson, Inc., v. O'Hara*, 277 Mich. 55 [upon which the Michigan court relied], this Court has jurisdiction to correct the error by giving to the Michigan 'Use Tax Act' like force, effect and validity as it accorded the 'Use Tax Act' of California,

Felt & Tarrant Co. v. Gallagher, 306 U.S. 62.

(f) The stage of the proceedings in the court of first instance, and the appellate court, at which, and the manner in which the federal questions sought to be reviewed were raised, the method of raising them, and the way they were passed upon by the court appears in the summary statement of the matter involved, and need not be repeated here.

V

Questions Presented

The questions presented in this case are as follows:

1. Would the Michigan 'Use Tax Act', as construed by the highest court of that State in the case at bar, and as sought to be applied to the respondent, J. B. Simpson, Inc., place unconstitutional burdens on interstate commerce, in violation of the commerce clause of the Federal Constitution [Article 1, § 8]?

2. May the Michigan legislature constitutionally compel a foreign corporation engaged in commerce between Illinois and Michigan,—conducting no intrastate business, as such, in Michigan, but licensed to do business and maintaining a branch office and employing salesmen to solicit orders in that state, subject to acceptance and delivery of the goods to an interstate carrier in Illinois [in the circumstances set forth in our summary statement and the record],—to collect from its Michigan customers, and pay to the State of Michigan, the tax imposed upon users and consumers of personal property by the Michigan 'Use Tax Act'?

3. Does the earlier decision of the Michigan Supreme Court rendered in *J. B. Simpson, Inc., v. O'Hara* [1936], 277 Mich. 55 [holding that, because of the commerce clause of the Federal Constitution, J. B. Simpson, Inc., is not subject to the tax imposed by the Michigan 'Sales Tax Act'] bar this Court from reviewing a subsequent Michigan decision involving the Michigan 'Use Tax Act', enacted after decisions in

Felt & Tarrant Mfg. Co. v. Gallagher, 306 U.S. 62,
McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33,
McGoldrick v. A. H. Dugrenier, Inc., 309 U.S. 70,
Jagels v. Taylor, 309 U.S. 619 [affirming 280 N.Y. 766],
Nelson v. Sears, Roebuck & Co., 312 U.S. 359, and
Nelson v. Montgomery Ward & Co., 312 U.S. 373,

sustaining statutes of import similar to those of Michigan? In other words, may not this Court consider the 'Use Tax Act' of Michigan untrammeled by the doctrine of res judicata?

VI

Reasons Relied on for Allowance of Writ

[Assignments of Error]

The reasons relied on for allowance of the writ of certiorari are that the Supreme Court of the State of Michigan erred in holding:

First: That the Michigan 'Use Tax Act', as construed by the court, and as sought to be applied to the respondent J. B. Simpson, Inc., would place unconstitutional burdens on interstate commerce, in violation of the commerce clause of the Federal Constitution [Article 1, § 8].

The court say:

> "In the case at bar the State seeks to impose a burden on interstate commerce not in any manner connected with intrastate commerce, and this may not be done. Plaintiff needed no authorization to do

> business in the course of interstate commerce in this state, and leave to do business in this state, unless an intrastate business is carried on and the intrastate and interstate business become associated, does not subject interstate commerce to any State-imposed burden".

Second: That the Michigan legislature constitutionally may not compel a foreign corporation engaged in commerce between Illinois and Michigan,—conducting no intrastate business, as such, in Michigan, but licensed to do business and maintaining a branch office and employing salesmen to solicit orders in that state, subject to acceptance and delivery of the goods to an interstate carrier in Illinois [in the circumstances set forth in our summary and the record],—to collect from its Michigan customers, and pay to the State of Michigan, the tax imposed upon users and consumers of personal property by the Michigan 'Use Tax Act'.

The court say:

> "Sanction of the claim made by the State would make plaintiff a collector of a tax, in behalf of the State, upon merchandise, manufactured, sold and, in the course of interstate commerce, delivered in Chicago for carriage to owners thereof in the State of Michigan, and such cannot be done, for the law-making arm of the legislature, and much less that of mere administrative officials, cannot reach into another State and mandate persons there to so serve. The use tax act does not accomplish any such thing".

Third: That under the doctrine of res judicata, the Supreme Court of the State of Michigan was bound by its own decision rendered in the earlier case of *J. B. Simpson, Inc., v. O'Hara* [1936], 277 Mich. 55 [rather than by subsequent decisions of this court], the court saying:

"Under the mentioned Federal decisions, a foreign corporation doing business within this State, subject to the sales tax, is liable for the use tax upon goods shipped into the State to residents as, in such case, the use tax is complementary as associated with the sales tax and not considered a burden upon what would otherwise be interstate commerce. The business here involved, upon which the State seeks to sustain the use tax, is the very business which we held, in *J. B. Simpson, Inc., v. O'Hara, supra,* was not subject to the sales tax, and upon that point that decision is res judicata. So dissociated, the business is strictly interstate commerce upon which the State may not impose the burden of the use tax or compel plaintiff to collect the same".

Fourth: That J. B. Simpson, Inc., did not sell merchandise at retail in the state of Michigan.

The court say:

"Here the plaintiff made no sales in this state subject to the sales tax. *J. B. Simpson, Inc., v. O'Hara, supra.* See, also, *Montgomery Ward & Co. v. Fry,* 277 Mich. 260. Merchandise was purchased by residents of Michigan from plaintiff in Illinois, with title passed in that state to the purchaser under express contract consummated in the state of Illinois. Plaintiff did not maintain retail stores nor sell merchandise at retail in this state, and such fact brings the case within the following exception noted in *Nelson v. Sears, Roebuck & Co., supra*:

'Respondent, however, insists that the duty of tax collection placed on it constitutes a regulation of and substantial burden upon interstate commerce and results in an impairment of the free flow of such commerce. It points to the fact that in its mail order business it is in competition with out-of-State mail order houses which need not and do not collect the tax on their Iowa sales.

> But those other concerns are not doing business in the State as foreign corporations. Hence, unlike respondent, they are not receiving benefits from Iowa for which it has the power to exact a price' ".

Fifth: That the decree in the circuit court, restraining defendants from exacting the asserted use tax from plaintiff, be affirmed.

Sixth: That the tax paid by plaintiff and impounded by order of the circuit court be released to plaintiff as owner thereof.

Seventh: That the Michigan 'Use Tax Act' does not impose any duty or tax upon the respondent J. B. Simpson, Inc.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari issue out of and under the seal of this Honorable Court, directed to the Supreme Court of the State of Michigan, commanding that court to certify and send to this Court, for its review and determination, a full and complete transcript of the record and all proceedings of said supreme court in the case numbered and entitled on its docket, No. 4, October Term, 1940, J. B. Simpson, Inc., an Illinois corporation, Plaintiff-Appellee, and Cross Appellant, v. Michigan State Board of Tax Administration, Defendant-Appellants, to the end that the opinion and decree of said supreme court may be reviewed and reversed by this Honorable Court, and that a decree may be entered for these petitioners.

VERNON J. BROWN, and others,
as MICHIGAN STATE BOARD
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